A Critique of Bill C-114 as Proposed Legislation on Pornography: Principles and Clause-By-Clause Analysis

by

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THE PRINCIPLES OF BILL C-114

Introduction

The purpose of this paper is to provide a philosophically based analysis of Bill C-114 which could serve as the basis for a brief to the legislative committee which will be reviewing the proposed legislation on pornography.

The Canadian Advisory Council on the Status of Women is proposing a "principled" approach to the legislation. Three major criteria for our evaluation of the Bill have been identified. These criteria, or principles, are central to the pornography debate.

Abstract principles, considered without reference to situation or context, can easily lead to what Sylvia Gold has coined as a "reality gap": the law may appear to say one thing, and may, indeed, say it, but when the law is considered in its social and historical context, it may result in surprisingly undesirable and counter-effective consequences. It is, therefore, important to ground our understanding of the proposed legislation in context-oriented principles. These are the criteria we believe to be fundamental to the protection of women's interests as they are affected by pornography, and this is the context from which we approach these same principles.

In reviewing previous Council positions, it appears that the major themes which are central to our stand on pornography are non-violence, equality, and women's right to freedom and privacy. In considering whether a particular piece of legislation respects these basic tenets, we propose three essential principles for evaluation:

- ***Harm*** -- does the legislation *prevent* harm to women, children and society at large?
- ***Healthy sexuality*** -- does the legislation allow for an appreciation of healthy adult sexuality?
- ***Equality*** -- does the legislation respect the legal, social and economic equality of women?

As sub-categories of the above three, two additional issues must be considered:

- ***Hatred*** -- does the legislation condemn hatred toward women as it is expressed through pornography?
- ***Commitment*** -- can the Bill be considered to be an explicit government disavowal of the pornographic image of women?

This paper will first detail each of these ideas, and will then evaluate if, and to what extent, they are respected in the proposed legislation.

The Criteria

☐ **Harm**

The harm to women caused by pornography must be analysed in the context of the larger issue of violence against women in contemporary society. It can be argued that "one of the harms of pornography is that it provides a framework that encourages a range of violent, coercive and exploitive acts against women".(1) The harm caused is generalized -- as long as women are portrayed as mere objects or sexual playthings, as suitable victims for torture and mutilation, their worth and abilities will continue to be undervalued and they will remain segregated from public life and the economic mainstream.

It has been argued that pornography is the "propaganda of misogyny" and undermines the principles of free and democratic society. Thus pornography can be considered harmful to society at large.(2)

Further, it is evident that the production of pornography, in its use of both physical and psychological coercion, is harmful to those who are its participants -- largely women and children.

☐ **Healthy Sexuality**

The fundamental distinction between pornography and erotica is central to the Canadian Advisory Council's definition of pornography.

> "Pornography is a presentation whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the presentation, and in which such behaviour can be taken to be advocated or endorsed." (Recommendation F4-1, September 1984)

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(1) Kathleen E. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique", *Ottawa Law Review* (1985) No. 1, Vol. 17, p. 51.
(2) Ibid., p. 54.

It is clear from this definition that the Council does not object to erotic material, that is, to the portrayal of sexual behaviour even of an explicit sort, as long as there is no degradation, violence or inequities of any sort characterizing the interaction, and no approval of these violent or degrading images. The problem with pornography is its violent and dehumanizing portrayal of women (and children), not its sexual content. Also, the pornographic nature of sexual material is determinable from the context in which the activity is depicted. Portrayals of violence toward women or a patently degrading representation will not be pornographic if these acts are neither advocated nor endorsed in the portrayal; for example, if the image is used to condemn the practice. The link between sex and violence must be broken and the expression of voluntary sexuality must be appreciated.

☐ **Equality**

The entrenchment of pornography in our culture gives it a significance quite beyond its blatant sexual messages. Despite the government's stated commitment to sexual equality, its implicit acceptance of pornography or the lack of explicit social disavowal of the pornographic image of women allows the image of women as objects to grow and to build on the sexist attitudes that serve as impediments to women's actual equality.

Pornography assails women's visions of themselves and their role in society and distorts men's (and women's) views of women's worth and of their sexuality. As the Fraser Report suggests, pornography is a reflection of the perception that women are inferior and that men can expect women to be available to service their sexual needs.(3) The portrayal of women as objects of sexual consumption threatens women's physical integrity and safety, and acts as a barrier to their social, legal and economic equality.

The Proposed Legislation

☐ **Does the proposed legislation prevent harm to women, children and society at large?**

Only visual material is addressed by the Bill

The bill deals only with visual pornography, not with written material except insofar as the written material involves the sexual abuse of children. However, it is the combined effect of the written and the visual which likely provides the greatest impact. One can easily foresee the situation where the picture

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(3) Government of Canada, *Pornography and Prostitution* -- Report of the Special Committee on Pornography and Prostitution, Vol. 1, p. 24.

is innocuous but the accompanying text is offensive. Under the Bill, this combination would not be covered.

It seems that the government was reluctant to enter the arena of literary censorship and therefore decided to refrain from addressing that aspect of the debate by orienting the legislation only toward visual depictions. It is agreed that the issue of censorship and freedom of expression is problematic, but the problem must eventually be dealt with.

A true commitment to dispelling the pornographic image of women cannot be piecemeal. Although *Criminal Code* amendments are essential, until a comprehensive policy is adopted, pornography will continue to be legal and available, and the sexist attitudes it portrays and encourages will be allowed to grow.

Pornography that shows physical harm and violent pornography are only partially covered by the Bill

Under the Bill, pornography that shows physical harm

> "means any pornography that shows a person in the act of causing or attempting to cause actual or simulated permanent or extended impairment of the body of any person or of its functions." (section 1, Bill C-114)

It is commendable that both actual and simulated harm are referred to in the section. However, the wording of the definition causes it to lose its full effectiveness.

First, the act must have caused or attempted to cause "actual or simulated permanent or extended impairment". What if it did not? What if the representation does not show such impairment nor does it look like it is causing pain and therefore, it slips past the violence section (see below) as well? An example of this might be a picture of a woman being spanked but seeming to enjoy it. Depictions such as these would fall into neither the harm nor the violence sections, and would therefore be permitted by the legislation. The image of women as objects of violence, even if the violence is not physically impairing, would thus be condoned.

Sexually violent behaviour is defined in the Bill as including

> "Sexual assault and any behaviour shown for the apparent purpose of causing sexual gratification to or stimulation of the viewer, in which physical pain is inflicted or apparently inflicted on a person by another person or by the person himself." (section 1, Bill C-114)

It is, of course, appreciated that violence against women is referred to in the legislation, but again, how does one *show* physical pain? In our previous example, if the woman is smiling as she is being spanked, is physical pain being inflicted or even apparently inflicted on her?

A further concern refers to the fact that "sexual gratification to or stimulation of the viewer" is not defined in the Bill. The section suggests that it is the *purpose* or *effect* of portrayal ("sexual gratification...") that renders the image pornographic, but if there is uncertainty as to how to identify that purpose, enforcement becomes problematic and doubtful.

We applaud the spirit of condemning violence against women that is evident in the Bill, but we are concerned that a legal interpretation of the wording opens the door to the legitimation of portrayals of harm and violence against women.

The offence of hate literature against women is not sufficiently effective

It is proposed in the Bill that the *Criminal Code* section on hate literature be amended to include sex as a distinguishing factor of an identifiable group. Thus, public incitement of "hatred" or "willfully promoting hatred" will become an offence when the target of these acts are women.

Although the danger inherent in pornography is best dealt with by way of clearly defined pornography offences, the expansion of the term "identifiable group" to include sex indicates an acknowledgement of the generalized harm to society caused by pornography. However, the consent of the Attorney General is still required for all prosecutions of this offence and once the offence is charged, the Crown must prove that the accused was "willfully" promoting hatred against women. This has been shown, time and time again, to be a very difficult task to achieve.

The hate propaganda sections are rarely invoked in judicial proceedings. It is unlikely that the amendment to the *Criminal Code* will be sufficient in combatting pornography through our criminal justice system.

It is evident that the government is committed, in principle, to addressing the issue of harm caused to women in the production of pornography. Where harm or violence are actually inflicted on women, the result will be pornographic and hence, criminal. The Bill also indicates the government's recognition of the harm that can be caused to women and to society at large by the image of women as victims of violence even if that violence is merely simulated. And yet the present drafting does not go far enough in its application. In its limitation to visual depictions, to "permanent or extended impairment" and its lack of clarity, many easily foreseeable portrayals of physical harm and violence toward women may be interpreted as being legal under the present draft.

☐ **Does the proposed legislation allow for an appreciation of healthy adult sexuality?**

There is no distinction in the Bill between sexual violence and erotica

The Bill defines pornography as material falling into one of four categories: "showing physical harm", "degrading", "sexually violent" or simply "pornography". This general category refers to:

> "... any visual matter showing vaginal, anal or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or *other sexual activity.*" (our emphasis)

It would seem, from this latter catch-all phrase, that *any* visual portrayal of sexual activity could be pornographic and hence, illegal.

The Council and other women's groups have insisted that the link between sex, violence and/or degradation is what characterizes sexual material as pornographic. The problem with pornography is its violent and dehumanizing portrayal of women, not its sexual content. And the problem with the proposed legislation is that while it does aim at denouncing violence toward women, the fact that it does not take into account the subtleties of human sexual experience results in what appears to be an "either/or" solution: either we criminalize everything, or nothing at all. In an area as subject to individual interpretation, such an approach would seem unjustified.

The definitions in the Bill are context-independent

The government is proposing a piece of legislation that renders virtually every visual depiction of human sexuality criminal. Not only does the Bill lack a recognition of the difference between sexual violence and voluntary sexual expression, but it does not indicate that the impact of an image is often deduced more from its *context* than from its actual *content*.

Under the proposed legislation, any visual depiction of sexual activity is liable to be classified pornographic. But depictions of such activities as anal or oral intercourse and masturbation may or may not be pornographic. Depending on their context, they are not in themselves offensive. If, however, any of these acts are being forced upon a person, or if force or violence can be implied from the content of the image, then the depiction may legitimately be considered pornography. But if the representation is one of voluntary sexual expression, with no element of power imbalance between the parties, then *this same act* can be considered an erotic image and beyond criminal sanction. Legislation must take into account the *essence* of what is being depicted. The subject matter is not enough of an indication.

A further example of the context-independence of the definitions in the Bill is found in the "degrading" pornography section. Ejaculation, lactation and menstruation are among those behaviours considered degrading. Although the definition as a whole is useful in its clarity, the lack of any reference to context renders *any* image of the three functions pornographic. Thus, a picture of a woman breastfeeding a baby would be considered pornographic.

The Council has suggested that the notion of power imbalance be central to any legislative definition of degradation. Moreover, our recommendation would consider representations of ejaculation, lactation and menstruation degrading only if they are described as an object of ridicule and for the apparent sexual gratification of the viewer. Such a qualification of context would seem more likely to protect women from abuse of their physical integrity while at the same time recognizing the humanity and beauty of that same physicality.

The present Bill is drafted in such a way that it could be seen as being a statement against sex, as opposed to being a statement against pornography. The federal government's intent is to provide "an effective attack on the personal and social ills resulting from the phenomenon of pornography".(4) Yet, in its failure to distinguish between pornography and erotica and its absolute ban on sexual representations irrespective of context, it can be seen as a message from the government that the criminal law is being used to set a moral standard reminiscent of Victorian attitudes toward sex and sexuality. In answer to the question, "does the proposed legislation allow for an appreciation of healthy adult sexuality?" one would have to answer, "No". To deny an entire facet of human reality is unnecessary if the intent is simply to protect society from the negative impacts of that reality. It can even be argued that denial only serves to reinforce those attitudes and inequities which the law is allegedly trying to suppress.

☐ **Does the legislation respect the legal, social and economic equality of women?**

The proposed legislation condones the distortion of women's visions of themselves, and of women's and men's views of their sexuality

The Bill provides for several offences in the display of visual pornographic material. The intent of these sections seems to be to protect people from being forced to see material that blatantly insults them and objectifies their bodies each time they go into their corner store. There is no doubt that we are influenced by facts and images presented to us, as well as by

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(4) Government of Canada, *Guide to the Federal Government's Response to the Reports on Sexual Abuse of Children, Pornography and Prostitution*, June 1986, p. 1.

images *not* presented to us. So if we see violent confrontation as the only model for sexual interaction, then it would be very difficult for us to develop alternatives to this approach, much less for us to learn how to establish these alternatives in everyday use.(5)

One startling omission seems to undercut the government's stated intention to eliminate the visibility of pornography. There is no offence under the Bill for the *display* of pornography that shows *physical harm*. Although importers, producers, distributors and retailers of this material are liable to a prison sentence of two to five years depending on the offence, a person who *displays* the material -- the corner store owner, for example -- is not committing an offence.

It is true that there are conditions attached to the display of any pornography. A further section requires that the material be hidden by a barrier or an opaque wrapping, *or* that a warning as to the nature of the merchandise be posted. However, it seems reasonable to presume that posting a warning sign is more convenient for the retailer than hiding the merchandise, and in fact, could even serve as advertising for the product.

Moreover, since the Bill does not contain a clause stipulating that any issue related to pornography and not covered by the *Criminal Code* would be regulated by the municipalities, it is likely that the simple warning sign provided for in the Bill would suffice, and that the municipalities would lack the jurisdiction required to introduce or enforce supplemental by-laws to control access (especially of children) to pornography.

So despite the Bill's implicit commitment to reject the view of women which is embodied in most contemporary pornography, the proposed mechanism for controlling the day-to-day visibility of that image will likely prove itself ineffective. Women will still be confronted daily with evidence of a distorted view of their bodies and their sexuality, and this view will continue to flourish as long as it is not effectively controlled. Again, it is not the portrayal of sexuality which should be forbidden but rather the perpetuation of a false and destructive reality. As long as women continue to be depicted as objects of sexual consumption, the sexist attitudes at the base of the formal and informal barriers to their equality will persist, and, in fact, could intensify.

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(5) Canadian Advisory Council on the Status of Women, *On Pornography and Prostitution* -- Brief Presented to the Special Committee on Pornography and Prostitution, April 1984, p. 4.

The defences available to charges under the Bill serve to condone the attitudes it alleges to condemn

Several defences are open to a charge under the degrading, violent or general sections of the Bill. To any of these offences, an accused could plead scientific or educational necessity or artistic merit. The defence of artistic merit raises one of the most contentious issues in regard to the prohibition of violent pornography, that is, the issue of the restriction of artistic expression. But artistic "expression" is not synonymous with artistic "merit", which is a very vague term. And given its vagueness, it is subject to judicial interpretation. As a result of this discretion, it is possible that an image clearly violent or degrading, and hence pornographic, could be exonerated by virtue of its "artistic merit". So despite the Bill's alleged commitment to condemning the portrayal of violence against women, this legislative "loophole" might easily legitimize those same images it hopes to dispel.

Each work of pornography on its own is defamatory libel, yet gains strength through reinforcement by other pornographic work. Further, the legislative condonation of the pornographic image of women in our culture communicates much more than the sexual message. The implicit acceptance or lack of explicit government disavowal of the objectification of female sexuality tells women, and men, that women and their sexuality have a specific role in society -- to serve as sexual playthings for men and as legitimate objects of ridicule and violence.

It is clear that these attitudes over time have played a "significant role in the historical allocation of women to subordinate roles in the social, political and economic order."(6) It is also clear that the role assigned to women in pornography reflects the sort of social attitude that inhibits improvement of the status of women.

Pornography *is* an equality issue. Women must have the right to be free from pornography if they are to take their legitimate and appropriate position in contemporary society.

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(6) Government of Canada, *Pornography and Prostitution* -- Report of the Special Committee on Pornography and Prostitution, Vol. 1, p. 24.

Conclusion

It can be argued that no matter what position the law has taken on pornography, the underlying misogyny of pornography is omni-present. Whether dehumanizing images of violence and degradation toward women will be allowed to flourish with impunity or whether all portrayals of women as sexual beings will be censored, the message is the same: sex is dangerous to women, and female sexuality is dangerous to society.

CLAUSE-BY-CLAUSE

Proposed Section 138

The definitions of section 138 should be in a logical rather than alphabetical order for coherence and clarity. Also, several discrepancies between the French and English texts of the definition section should be clarified for greater consistency. Finally, we suggest that a basic definition of "pornography" be followed, in order, by definitions of "violent behaviour" and "degrading behaviour".

☐ **Language discrepancies**

Definitions of "document pornographique à scènes de sévices" and of "comportement sexuel violent"
Although the definitions in this section are not presented in a logical order, the rules of legal construction hold that the same word must be given the same meaning within the context of the same law unless there is explicit mention to the contrary. This would be even more true with respect to the same word used more than once within a *section* of the law.

The French definition of "sexually violent behaviour" -- "comportement sexuel violent" -- refers to behaviours characterized by "sévices". The word "sévices" should therefore be given the same meaning in a later definition of this section, "document pornographique à scènes de sévices". Yet, given the usage of the word "sévices" in both these definitions, it seems that the latter would not constitute a definition in itself, but rather an explanation of what is included in "comportement sexuel violent".

This problem does not exist in the English text where "sexually violent behaviour" (which refers to "physical pain") and "pornography that shows harm" (where "harm" is the operative word) are clearly two distinct definitions. It seems reasonable to conclude that the government intended to identify two specific concepts, and this should be clarified in the French text.

Definition of "document pornographique"
The English text of this definition ends with the phrase "or other sexual activity". This would seem to render pornographic virtually every expression of sexuality.

The French text does not include this general term. We would suggest that it should be removed from the English text.

Definition of "document pornographique dégradant"
The definition in the English text ends with the phrase "an act of bondage or any act in which one person attempts to degrade himself or another."

The French text takes up the concept of servility, but ends with the phrase "ou montrant des actes d'esclavage ou d'asservissement."

Is "bondage" then translated by "esclavage ou asservissement"? This seems curious since there is a specific French term -- "ligotage" -- for bondage, which does not refer specifically to the same notion as does "esclavage ou asservissement". On the other hand, the notion of slavery and submission should probably be added to the English text.

If then, "bondage" is to be kept in the English, two changes should be made to the Bill:

- "ligotage" should be added to the French text
- "slavery and submission" should be added to the English text.

C-114 -- Proposed Section 138	CACSW Amendments
☐ **Pornography**	
"... means any visual matter showing vaginal, anal, or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or other sexual activity."	" ... means the portrayal or description of violent or degrading behaviour or behaviour resulting in or likely to result in death, inflicted by one person onto another or by that person onto her or himself and depicted or described for the apparent purpose of causing sexual gratification to or stimulation of the viewer, reader or listener, and in which such behaviour can be taken to be advocated or endorsed."

Comments:
We are dissatisfied with the Bill's proposed definition. It is an enumeration without distinction or reference to context, and the "other sexual activity" phrase in the English version is potentially too comprehensive: sexual acts are not necessarily in themselves pornographic.

The amended definition includes textual, aural and visual descriptions of violent and degrading behaviour and of behaviour resulting in or likely to result in death. This latter category would be separate from the more general "violent" behaviours in order to create a more severe offence with respect to "snuff" films. The amendment also adds a "purpose" element to the portrayal or description in order to distinguish pornography from other explicit material which would seem to condemn rather than condone the behaviour.

Although a "purpose" section is necessary in order to distinguish various types of sexually explicit material, a definition of "sexual gratification or stimulation" would be useful in identifying material intended for this purpose. We would therefore suggest a definitional section which would read:

"(a) Material is presumed to be depicted or described for the apparent purpose of causing sexual gratification to or stimulation of the viewer, reader or listener when it depicts or describes:

(i) oral, anal or vaginal intercourse, or attempted oral, anal or vaginal intercourse; or

(ii) masturbation; or

(iii) the naked breasts of a female, or the naked genitals, anus or buttocks of a person; or

(iv) the breasts of a woman, or the buttocks, genitals or anus of a person being touched by the mouth or genitals of another;

or when the material places emphasis on:

(i) the genitals, even if they are not nude; or

(ii) the nude parts of the body even if they are not the genitals;

or when the overall context of the film, publication or other thing in which the material is placed has an apparent purpose of causing sexual gratification to or stimulation of the viewer, reader or listener."

Finally, "pornography" would be limited to those depictions, where the behaviour could be seen to be advocated or endorsed. This would exonerate sexually explicit material which would clearly condemn the behaviours it portrays.

C-114 -- Proposed Section 138	CACSW Amendments
☐ **Pornography that shows harm**	
"...means any pornography that shows a person in the act of causing or attempting to cause actual or simulated permanent or extended impairment of the body of any person or of its functions."	We would eliminate this definition entirely and include it in the definition of "violent behaviour".

Comments:
We are concerned that the condition that this form of pornography must show "permanent or extended impairment" might result in the legitimization of less permanent or extended, but equally harmful behaviour.

We would include the description of pornography showing physical harm in the definition of "violent behaviour". If a person were harmed in order to produce the pornography, then the pornography would presumably be showing violent behaviour in a sexual context. As will be discussed below, the harm caused could be of three intensities: harm resulting from:

- behaviour resulting in or likely to result in death,
- sexual assault or aggravated sexual assault,
- assault or aggravated assault.

C-114 -- Proposed Section 138	CACSW Amendments
☐ **Sexually violent behaviour**	☐ **Violent behaviour**
"... includes sexual assault and any behaviour shown for the apparent purpose of causing sexual gratification to or stimulation of the viewer, in which physical pain is inflicted on a person by another person or by the person himself."	"...includes: (a) behaviour resulting in or likely to result in death, (b) assault or aggravated assault, or (c) sexual assault or aggravated sexual assault whether these acts are real, threatened, simulated or in a fantasy setting, and whether or not the participants have or seem to have consented to the activity, and whether or not the participants enjoy or seem to enjoy the activity."

Comments:

The amended section would incorporate the case of pornography showing physical harm. It extends the various settings for violent behaviour to include simulations and fantasies. Self-inflicted harm is now included in the definition of pornography. Sexual assault, aggravated sexual assault, assault and aggravated assault (the latter three added by us to the definition), are already defined in the *Criminal Code* at sections 244 to 246.3. All forms of physical violence and different intensities of this violence would thus be covered by the amended section.

The final phrase of the amendment would apply to the frequent portrayal of women enjoying the harm, pain and violence being inflicted on them and to the issue of consent. The definition would therefore constitute a presumption holding that where there are portrayals or descriptions of behaviour mentioned in the section, that behaviour is deemed to be violent even if seemingly enjoyed by the participants, and even if they seem to have consented to it.

Finally, according to our definitions, these representations would be considered pornographic only if presented for the apparent purpose of causing sexual gratification to or stimulation of the viewer, reader or listener.

C-114 -- Proposed Section 138	CACSW Amendments
☐ **Degrading pornography** "...means any pornography that shows defecation, urination, ejaculation or expectoration by one person onto another, lactation, menstruation, penetration of a bodily orifice with an object, one person treating himself or another as an animal or object, an act of bondage or any act in which one person attemps to degrade himself or another."	☐ **Degrading behaviour** "...includes: (a) necrophilia; (b) bestiality; (c) incest; (d) a person being urinated or defecated on, or being ejaculated upon or spat upon; (e) acts of slavery or submission; (f) penetration of a bodily orifice by an object; (g) a person being treated as an animal or object; (h) pregnancy, lactation or menstruation if these functions are misrepresented, or described as objects of ridicule; (i) a female person apparently or implicitly forced to exhibit her breasts or any person apparently or implicitly forced to exhibit his or her genitals, anus or buttocks; (j) a power imbalance. A power imbalance includes situations in which there is more emphasis on the nudity of one sex than on the nudity of the other sex or in which there is more emphasis on the breasts or genitals of one sex than on the genitals of the other sex or in which there is shown, described or implied force or coercion.

> For the purposes of this section, behaviour is considered degrading whether or not the participants have or seem to have consented to the activity and whether or not they enjoy or seem to enjoy the activity."

Comments:

We are dissatisfied with the proposed definition since again, it is an enumeration without distinction or reference to context.

The amendment includes all of the activities mentioned in the proposed definition, but adds the notion of a power imbalance between the participants. Although we are aware that representations of the nudity of one sex while the other is clothed may be considered *sexist* rather than *pornographic*, we have included it in the definition of "power imbalance" since representations of nude women and clothed men highlight the physical vulnerability of women to their clothed male partners. The amendment also considers as degrading the ridiculization of pregnancy, lactation and menstruation, but does not consider degrading these processes in and of themselves.

Again, the last phrase provides for those situations where a person is shown or described as enjoying or consenting to the degrading activity.

Finally, these representations would be considered pornographic only if presented for the apparent purpose of causing sexual gratification of or stimulation to the viewer, reader or listener.

C-114 -- Proposed Section 159	CACSW Amendments
☐ **Offence of producing and distributing (...) pornography that shows physical harm**	
"159(1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any pornography that shows physical harm is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years."	We would replace this offence with an offence of producing and distributing (...) pornography that portrays or describes behaviour resulting in or likely to result in death or aggravated assault or aggravated sexual assault. We would increase the maximum sentence to *10* years imprisonment."

Comments:
We believe that there is no justification for treating differently on the one hand pornographic material involving children (even if it does not show physical harm, and which is liable to a *ten*-year term -- section 162(2)) and pornography showing physical harm involving adults; and on the other hand, the fact of inflicting harm (which constitutes assault and is liable to a ten-year term), and the fact of *representing* this same harm for sexual and commercial purposes.

Although pornography that shows physical harm falls within our definition of pornography portraying or describing violent behaviour, we believe that there should be a separate and more serious offence surrounding pornography that shows or describes behaviour resulting in or likely to result in death, or aggravated assault, or aggravated sexual assault.

N.B. The Bill does not provide anywhere for an offence of displaying "pornography that shows physical harm". This was likely an omission and unintended. Since by virtue of our re-definition, this more serious form of violence falls within our "violent behaviour" section, the offence of displaying this material should fall within the general "Display of (any) pornography" offence.

C-114 -- Proposed Section 159	CACSW Amendments
☐ **Offence of selling or renting (...) pornography that shows physical harm**	
"159(2) Every person who sells, rents, offers to sell or rent, receives for sale or rental or possesses for the purpose of sale or rental any pornography that shows physical harm is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction."	We would create the offence of selling or renting (...) pornography that portrays or describes behaviour resulting in or likely to result in death, or aggravated assault or aggravated sexual assault. We would increase the maximum penalty to a *five*-year prison term. We would limit the offence to indictments rather than providing for the possibility of procedure by summary conviction.

Comments:
The new offence of retailing this material is created in order to be consistent with the new category of pornography.

We suggest that the maximum prison sentence be increased from two to five years in recognition of the more serious nature of this type of pornography.

Finally, we would limit this offence to procedure by indictment rather than summary conviction. Were either alternative possible, it is conceivable that one retailer could be condemned to a two-year prison term and another to six months even though they both sold the same material. If we are to acknowledge the seriousness of the existence and distribution of pornography that is violent to this degree, then the crime of retailing it should be serious as well.

C-114 -- Proposed Sections 159.1(1)(2), 159.2(1)(2)	CACSW Amendments
☐ **Offences of producing, distributing (...) selling or renting (...) or displaying violent or degrading pornography**	☐ **Offences**
"159.1(1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any *degrading pornography* is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years. 159.1(2) Every person who (a) sells, rents, offers to sell or rent, receives for sale or rental or possesses for the purpose of sale or rental any degrading pornography, or (b) displays, in a way that is visible to a member of the public in a public place, any degrading pornography is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.	We would reformulate these sections to cover the new offence of producing, distributing (...) pornography that portrays or describes assault or sexual assault or degrading behaviour. This would be an indictable offence liable to imprisonment for a term not exceeding five years. We would create another offence for selling, renting (...) this same material. It would be an indictable offence or punishable on summary conviction with a maximum imprisonment term of two years.
159.2(1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any pornography that shows *sexually violent behaviour* is	We would create a final offence for the disply to the public of *any* pornography. This, too, would be an indictable offence or punishable on summary conviction with a maximum imprisonment term of two years.

guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

159.2(2) Every person who

(a) sells, rents, offers to sell or rent, receives for sale or rental or possesses for the purpose of sale or rental any pornography that shows sexually violent behaviour, or
(b) displays, in a way that is visible to a member of the public in a public place, any pornography that shows sexually violent behaviour

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction."

Comments:
We suggest these amendments for the sake of clarity and brevity. In terms of the production (...) or retailing (...) of violent (i.e., that isn't already covered under the preceding offence) or degrading pornography, the amendments are stylistic rather than substantive: rather than having four offence sub-sections, there would be two: it is an offence to either produce (...) or retail(...) these categories of pornography. The penalties, again two instead of four, depend on the offence.

Our suggestion that there be *one* offence section for the display of any form of pornography brings a stylistic *and* a substantive change to the Bill. The Bill currently provides for a display offence for violent or degrading pornography. No such offence is foreseen for pornography that shows physical harm. Our proposed offence would cover the display of *any* material falling within our definition of pornography. The choice in procedure would allow for differential treatment for the display of different material, but the maximum imprisonment term would be two years. We believe that if an effective mechanism is provided for to limit the production and distribution of the more serious forms of pornography, then it is reasonable for a potential displayer to presume that the material to be displayed is lawful. If that person is mistaken, a maximum sentence of two years would seem reasonable.

Proposed Sections 159.1, 159.2

☐ **Language discrepancies**

See "Comments" for this section with respect to the defences of "artistic merit" and "oeuvre d'art".

C-114 -- Proposed Sections 159.1(3)(4), 159.2(3)(4)	**CACSW Amendments**
☐ **Defences to a charge of producing, distributing, (...) selling or renting, (..) or displaying violent or degrading pornography**	☐ **Defences**
	The current Bill does offer defences to these charges except with regard to the display of pornography that shows physical harm.
"159.1(3) Where an accused is charged with an offence under subsection (1) or paragraph (2)(a), the court may find the accused not guilty if the accused proves that the degrading pornography has a genuine educational or scientific purpose or is a work of artistic merit.	We, like the Bill, would not allow for any defences to any charge involving pornography of the most serious order, i.e., that portrays or describes behaviour resulting in or likely to result in death, or aggravated assault or aggravated sexual assault.
159.1(4) Where an accused is charged with an offence under paragraph (2)(b), the court may find the accused not guilty if the accused proves	For pornography that portrays or describes degrading behaviour not already included in the first order, we would retain the defences of educational or scientific necessity.
(a) that the degrading pornography has a genuine educational or scientific purpose; or (b) that the degrading pornography is a work of artistic merit and that an appropriate warning to the public was displayed.	We would eliminate "artistic merit" as a defence. We would create a defence for "works of art" for the pornography referred to in point (2) of the defences.

159.2(3) Where an accused is charged with an offence under subsection (1) or paragraph (2)(a), the court may find the accused not guilty if the accused proves that the pornography has a genuine educational or scientific purpose or is a work of artistic merit.

159.1(4) Where an accused is charged with an offence under paragraph (2)(b), the court may find the accused not guilty if the accused proves

(a) that the pornography has a genuine educational or scientific purpose; or
(b) that the pornography is a work of artistic merit and that an appropriate warning to the public was displayed."

Comments:
Although artistic *expression* is a significant value to be recognized, artistic ***merit*** as a defence raises serious concerns as to possible judicial interpretation. The vagueness of the term, and the judicial discretion flowing from that, could result in images clearly violent or degrading being exonerated by virtue of the fact that they have "artistic merit" -- were "well done". We do not legitimize murder because it was effected with "panache" or flair; we should not do so when harm to women is at issue.

It is interesting that the French text speaks of "oeuvre d'art" -- work of art -- not "artistic merit". The discrepancy between the two terms is vast. However difficult it may be, if it were possible to establish criteria for determining what constitutes a "work of art", that would be a more appropriate defence regarding the protection of artistic expression than is "artistic merit".

Re: Sections 159.1(4)(b), 159.2(4)(b): these sections refer to the posting of a warning sign where pornographic material of "artistic merit" is displayed. We suggest that if indeed the defence of artistic merit is dropped, then the warning sign is not necessary either. If the defence of "work of art" is accepted, then a warning sign should not prove necessary. Do we need a warning sign each time we pass a work of art in a museum?

C-114 -- Proposed Section 159.3 CACSW Amendments

☐ **Offence of producing, distributing, (...) selling or renting (...) of other pornography**

"159.3(1) Every person who imports, makes, prints, publishes, broadcasts, distributes or possesses for the purpose of distribution any pornography other than pornography referred to in section 159, 159.1 or 159.2 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

159.3(2) Every person who

(a) sells, rents, offers to sell or rent, receives for sale or rental or possesses for the purpose of sale or rental any pornography referred to in subsection (1), or
(b) displays, in a way that is visible to a member of the public in a public place, any pornography referred to in subsection (1)

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction."

This section should be deleted.

Comments:

If section 159.3 refers to material other than pornography showing physical harm, or violent or degrading material, then it is logical to presume that it refers to the fourth category of section 138, that is, "pornography". However, as we have already stated, we would eliminate this definition from section 138 since it is an enumeration without distinction or reference to context and it communicates the idea that *any* visual representation of sexual activity is in itself pornographic. The Council has always underlined the necessity of distinguishing between pornography, which is violent or degrading, and erotica, which is not.

C-114 -- Proposed Section 159.4 CACSW Amendments

☐ **Display of pornography**

"159.4 Every person who displays any pornography or other material in which the breasts or genitals are shown for a sexual purpose in a way that is visible to a member of the public in a public place unless the public must, in order to see the pornography or material, pass a prominent warning notice advising of the nature of the display therein or unless the pornography or material is hidden by a barrier or is covered by an opaque wrapper is guilty of an offence punishable on summary conviction."

The term "*pornography or other material* in which the breasts or genitals are shown for a sexual purpose" is imprecise. The conditions for display as they are set out in this section seem to provide a means of defence against a charge of unlawful display which is incompatible with the defences already available under sections 159.1, 159.2 and 159.3. The material to which this section applies should therefore be clarified.

Were our definition of pornography to be adopted, we would suggest that the material referred to in this section should be representations of nudity or of sexual activity not considered pornographic according to our definition of pornography. We would label this material "sexually explicit material other than pornography".

There is a question as to the effectiveness of *either* an opaque barrier hiding the material *or* the posting of a warning notice.

There is a question, too, as to the constitutionality of display provisions in the *Criminal Code* since the provinces (through the municipalities) usually regulate display and sale.

Comments:
It is unclear what is meant by the term "pornography or other material". Since sections 159.1, 159.2 and 159.3 already consider the fact of displaying violent or degrading pornography as an indictable or summary conviction offence, we presume that the "material" referred to in section 159.4 refers to representations of nudity. If the government did intend section 159.4 to apply to pornography, then sections 159.1 and 159.2 would be prohibiting the sale of the material, and this section would be determining *how* it could be sold. Further, under the section, a wrapping, opaque barrier or warning sign is sufficient to offset a charge of displaying this material and the offence is punishable only on summary conviction. Yet under the previous sections, educational or scientific necessity or artistic merit must be demonstrated and the offence can be indictable. The government likely did not intend to create a third means of defence for sections 159.1, 159.2 and 159.3. The term "pornography or other material" should therefore be clarified.

If, on the other hand, and as government officials seem to understand, the material referred to is that pornography which has been exonerated by one of the defences previously set out, then this section would be even less coherent. If a person who has displayed pornography can be found "not guilty" (see section 159.1(4)) of the offence of displaying pornography by virtue of its "educational or scientific necessity" or "artistic merit" (see section 159.1(3)), then section 159.4's display conditions would seem unnecessary. How could an individual be *not guilty* of an offence under one section (159.1(4)) and then be *guilty* of the same offence by virtue of a subsequent section (159.4)? If the government intended this section to apply to previously exonerated pornography, then the section 159.1(3) defences should at least include a "subject to section 159.4" clause.

If the conditions for display of material showing nudity are kept as they now appear, then the posting of a simple warning sign would be sufficient to offset a charge of displaying the material. The section now requires an opaque barrier *or* wrapping *or* sign. If the government believes that the public should be protected from day-to-day visibility of this type of material, then it should require some form of opaque barrier, not just the warning.

With regard to the constitutionality of federal jurisdiction over the display and sale of pornography, it is clear that traditionally, the provinces, through their municipalities, have regulated this aspect of the law relating to obscenity. Yet tradition does not confer jurisdiction. The issue is: if the federal legislature is within its jurisdiction in defining pornography, then it is possibly justified in determining *who* should be allowed access to the material. (This would be similar to its jurisdiction and control over narcotics or firearms.) If this is true, then we must ask whether determining

accessibility includes determining conditions for display.

If, on the other hand, display is entirely within provincial jurisdiction, then we must ask whether Parliament is justified in determining the material to which provincial display laws will apply. If it is, and if this is the message it wishes to project in the Bill, then perhaps there should be an accessibility section followed by a section stating that anything relating to pornography and not included in the Bill will be regulated by the provinces. That way, uniformity in access will be established, without restriction on provincial control of conditions of sale and display.

A further confusion appears when one reads section 159.4 in conjunction with section 159.7 which refers back to sections 159.4, 159.5 and 159.6 and provides as a defence to a charge of displaying pornography to minors the fact that provincial laws had classified or rated the material in question acceptable for viewing by persons under eighteen. Whereas section 159.4 seems to confer federal jurisdiction over display, subsequent sections provide a means of defence against display of this *same material* based on provincial jurisdiction. This inconsistency would be clarified by a legislative pronouncement one way or the other.

C-114 -- Proposed Section 159.5 CACSW Amendments

☐ **Theatrical Presentations**

"159.5 Every owner, lessee, manager or person in charge of a theatre who presents or allows to be presented any pornography or any material referred to in section 159.4 in the presence of a person under the age of eighteen years is guilty of an offence punishable on summary conviction."

Comments:
See comments for sections 159.4 and 159.6 re: minors.

C-114 -- Proposed Section 159.6 CACSW Amendments

☐ **Sale or rental of pornography to a person under 18**

"159.6(1) For the purpose of this section and of section 159.7, "pornographic material" means

(a) any matter the dominant contents of which are a description of masturbation or vaginal, anal or oral intercourse;
(b) any matter showing masturbation or vaginal, anal or oral intercourse; or
(c) any matter showing or describing
  (i) ejaculation, sexually violent behaviour, bestiality, incest or necrophilia, or
  (ii) any act referred to in the definition of "degrading pornography" or of "pornography that shows physical harm" in section 138.

159.6(2) Every person who sells, rents or offers to sell or rent any pornographic material or any material referred to in section 159.4 to a person under the age of eighteen years is guilty of an offence punishable on summary conviction."

We suggest that the display, sale or rental of pornogaphic material to minors, which is considered in this section to be a summary conviction offence, be as serious an offence as display to adults which is either an indictable or summary conviction offence.

Comments:
The definition of "pornographic material" in this section refers to all forms of pornography under section 138 as well as to the nudity material referred to in section 159.4. Display or sale to adults of "pornography" can be an indictable offence whereas this section renders such display or sale to *minors* subject to summary conviction only. Why create a section referring specifically to minors if the section is to be *less* restrictive with regard to them?

After discussion with government officials, it seems that this section was meant to apply to pornography previously legitimized by either the "educational or scientific necessity" or "artistic merit" defences. Display of this material would thus be legal with respect to adults, but illegal with respect to minors. If this is so, the section should explicitly refer to material previously "successfully defended".

If, however, the section referred only to representations of nudity or what we, by virtue of our definitions, would consider "sexually explicit material other than pornography", then we would understand the creation of a specific offence for the display or sale of this material to minors. If this were the intention of Parliament, then the section should explicitly so state.

C-114 -- Proposed Section 159.7	CACSW Amendments
☐ **Defences to a charge of exhibition or display of pornography to a person under 18**	
"159.7 It is a defence to a charge under section 159.5 or 159.6 that (a) the accused used due care and diligence to ensure that there was no pornography or pornographic material, as the case may be, or material referred to in section 159.4 in the thing sold, rented, offered for sale or rental, presented or allowed to be presented; (b) the pornography or pornographic material, as the case may be, or material referred to in section 159.4 has a genuine educational or scientific purpose and was sold, rented, offered for sale or rental, presented or allowed to be presented for that purpose; or (c) according to the classification system made by or under a law in force in the province in which the pornography or pornographic material, as the case may be, or material referred to in section 159.4 was sold, rented, offered for sale or rental, presented or allowed to be presented, it had been classified or rated as acceptable for viewing by persons under the age of eighteen years."	We would suggest that the nature of the powers attributed to the provinces should be clarified to avoid jurisdictional conflict.

Comments:
The section would be clear if the material referred to was only sexually explicit material without violent or degrading elements. In that case, the provinces could possibly be delegated the power to decide what of this material would be accessible to minors. But since the section refers to sections 159.4, 159.5 and 159.6 and since these sections refer to violent, degrading and "other" pornography, then it seems as if the government is saying that provincial classification systems will have precedence over *Criminal Code* provisions. This would seem absurd, and the section should be clarified.

Again, government officials claim that subsection (c) was intented to apply to pornography already successfully defended by one of the defences provided for in the Bill. If this is so, then the section should be more explicit. As it stands, however, pornography clearly criminal by virtue of the *Criminal Code* definition could be "de-criminalized" by virtue of a provincial classification scheme. Thus, definitional jurisdiction over criminal law with respect to pornography would implicitly be shifted to the provinces.

See comments for section 159.4.